Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-874

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

California v. *Grace Brethren Church*, No. 81-31 (June 18, 1982) 1, 3

Donovan v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 ..... 1, 6, 7

Fleming v. *Rhodes*, 331 U.S. 100 2

Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 7

McLucas v. *DeChamplain*, 421 U.S. 21 ..... 1, 4

United States v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561 7

United States v. *Clark*, 445 U.S. 23 ..... 1, 2, 3

United States v. *Raines*, 362 U.S. 17 1-2

Williams v. *Zbaraz*, 448 U.S. 358 1

Statutes:

Social Security Act, Section 211(a)(5)(A), 42 U.S.C. 411(a)(5)(A) 5, 6

28 U.S.C. 1252 ..... 1, 2, 3, 4, 5, 6, 7

28 U.S.C. 1291 5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-874

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondents cite in their brief in opposition a number of decisions of this Court involving direct appeals taken pursuant to 28 U.S.C. 1252. What respondents fail to point out, however, is that in *every* case they mention, the party who invoked this Court's jurisdiction under Section 1252 sought review of the lower court's constitutional holding. See *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 1, 10-13, 24-25; *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982); *Williams* v. *Zbaraz*, 448 U.S. 358, 366 (1980);[1] *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980);[2] *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975);[3] *United*

---

[1]See 79-4 J.S. 7; 79-5 J.S. 6, 16; 79-491 J.S. 2 (1979 Term).

[2]See 78-1513 J.S. 2 (1978 Term).

[3]See 73-1346 J.S. 2 (1973 Term).

States v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-104, 106-107 (1947). A direct appeal to this Court obviously lies in those circumstances; indeed, Section 1252 was intended for precisely such cases. None of the decisions respondents cite addresses the quite different question, involved in this case, of whether an appeal must be taken directly to this Court even when the appeal raises only issues other than the constitutionality of an Act of Congress.[4]

Respondents nevertheless contend (Br. in Opp. 4) that this Court's decision in *United States* v. *Clark*, *supra*, supports their position. This contention is plainly wrong. In *Clark*, the appellee argued that an appeal did not lie under Section 1252 because the Court of Claims did not actually hold an Act of Congress unconstitutional—one of the explicit threshold requirements for taking an appeal under 28 U.S.C. 1252. Instead, it was argued, the government had conceded that a prior decision of the Court of Claims holding the same statute unconstitutional was dispositive.[5] This Court concluded, however, that a determination that the statutory provision was unconstitutional "was a necessary predicate to the relief" granted to the appellee's children and that "this determination of unconstitutionality may be appealed under § 1252" (445 U.S. at 26 n.2), even though the Court of Claims had reached its conclusion by relying

---

[4]After the district court entered the judgment that is at issue here, it entered an order on December 1, 1982 awarding attorney's fees to respondents. In light of the court of appeals' dismissal of the appeal at issue here, the government, on January 3, 1983, filed a notice of direct appeal to this Court from the order awarding attorney's fees, to preserve the government's right of appeal under the Ninth Circuit's apparent view of 28 U.S.C. 1252 as requiring a direct appeal even on nonconstitutional issues. We cannot believe, however, that Congress intended such issues to be added to this Court's mandatory docket.

[5]78-1513 Mot. to Aff. 13 (1978 Term).

on its earlier ruling (*ibid.*). Thus, although the government had conceded in *Clark* that the case was controlled in the Court of Claims by a prior decision of that court, it did not concede that the statute was unconstitutional; to the contrary, it sought review of the constitutional holding in this Court. In the instant case, unlike in *Clark*, it is not the "determination of unconstitutionality" that the Secretary seeks to have reviewed (445 U.S. at 26 n.2), but other matters.[6]

Respondents' reliance (Br. in Opp. 3) on *California* v. *Grace Brethren Church, supra*, is misplaced for the same reason. Quoting a phrase from the opinion in that case out of context, respondents contend that as long as the "determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' " (slip op. 11, quoting *United States* v. *Clark, supra*, 445 U.S. at 26 n.2), a direct appeal lies to this Court under 28 U.S.C. 1252. As explained below, however, the question involved in *Grace Brethren Church*, like that in *Clark*, was whether the district court had actually decided the question of the constitutionality of an Act of Congress so that the appellants could in turn take a direct appeal for the purpose of presenting that same question to this Court.

Although the district court in *Grace Brethren Church* did not expressly hold the provision of the Federal Unemployment Tax Act (FUTA) unconstitutional (slip op. 11), it did hold the closely related state statute unconstitutional and

---

[6]Respondents contend (Br. in Opp. 4) that *Clark* is similar to this case because there, as here, the only issues considered by the lower court related to relief. The relevant inquiry for purposes of 28 U.S.C. 1252, however, is not what issues the lower court actively "considered" (rather than regarded as conceded by a party or foreclosed by prior decisions), but whether this Court would be asked to pass on the constitutional question. If so, as in *Clark*, a direct appeal lies; if not, as here, a direct appeal does not lie. See Pet. 12-13 n.9.

enjoined the state officials from collecting taxes under it (*id.* at 8). This Court concluded that the district court's holding that the state statute was unconstitutional was based solely on the court's understanding of the FUTA (*id.* at 9-11). Accordingly, the Court held, in the passage quoted above and by respondents, that a determination that the FUTA was unconstitutional "was a necessary predicate to the relief" granted against the state officials and that an Act of Congress therefore had been held unconstitutional for purposes of 28 U.S.C. 1252. For this reason, the state and federal officials were free to take a direct appeal to challenge this constitutional holding. The Court did not suggest that a direct appeal would have been required if the state and federal officials had acquiesced in and therefore had not sought review of the district court's constitutional holding and the state officials had appealed only the relief ordered by the district court, as the Secretary did here.

2. Respondents also miss the significance of the second paragraph of 28 U.S.C. 1252, which, unlike the decisions upon which they rely, does address the matter of appeals to the court of appeals in cases in which an Act of Congress has been held unconstitutional.[7] Respondents contend (Br. in Opp. 6) that the intent of this paragraph is only to ensure that all aspects of a single case would be brought to this Court, consistent with the principle that an appeal under Section 1252 brings before the Court "not only the constitutional question, but the whole case." *McLucas* v. *DeChamplain, supra*, 421 U.S. at 31.

---

[7]The second paragraph of Section 1252 provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

This explanation of the purpose of the second paragraph ignores the fact that, by the terms of the first sentence, it is only *after* a party receives a notice of direct appeal under Section 1252 that all other appeals and cross appeals in the case must be taken to this Court. Prior to or in the absence of a direct appeal pursuant to the first paragraph of Section 1252, the right to take other appeals to the court of appeals pursuant to 28 U.S.C. 1291 is preserved. Similarly, the second sentence of the second paragraph of Section 1252 provides that appeals to "other courts" prior to the notice of direct appeal "shall be treated as taken directly to ~~this~~ the Supreme Court"; such appeals are not deemed jurisdictionally defective because they were taken to the court of appeals in the first instance rather than directly to the Supreme Court. The second paragraph of Section 1252 thus makes clear that even in cases in which an Act of Congress has been held unconstitutional, appeals not challenging the holding of unconstitutionality must be taken to the court of appeals under Section 1291.[8]

3. Perhaps recognizing the flaws in their legal argument, respondents contend (Br. in Opp. 2) that in any event the record in this case shows that the Secretary appealed the entire judgment, including the constitutional holding, not just the relief ordered by the district court. In fact, the record shows just the opposite. As we explain in the certiorari petition (Pet. 7), on May 5, 1982—almost a month *before* respondents moved to dismiss the appeal—the government stated in its docketing statement filed in the court of appeals that it had conceded that Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. 411(a)(5)(A), is unconstitutional and that the only questions remaining and to be raised in the court of appeals

---

[8]The legislative history supports this reading of the second paragraph. See Pet. 15-17.

concerned the relief ordered by the district court. This docketing statement was attached as Exhibit G to respondents' brief in support of their motion to dismiss the appeal in the court of appeals. Respondents therefore were well aware that the government was not challenging the constitutional holding on appeal.[9]

4. Respondents do not deny that the court of appeals' order dismissing the government's appeal leaves standing a district court order on relief that (i) is of substantial importance, (ii) binds the Secretary in the administration of the Social Security Act in all community property states, and (iii) conflicts with the decisions of two other courts of appeals and one district court that have considered these same question in the identical setting. See Pet. 19-20. Nor do respondents make any effort to defend the relief ordered by the district court, which, as we have explained (Pet. 19-20), is erroneous in a number of respects. Their only answer is that the Secretary, the Trust Fund and the public must live with this result because the government failed to follow what they term the "clear commands" of 28 U.S.C. 1252 that a direct appeal be taken (Br. in Opp. 7, quoting *Donovan* v. *Richland County Association for Retarded Citizens, supra*, 454 U.S. at 390). See also Pet. 19 n.14.

---

[9]Respondents maintain (Br. in Opp. 3) that the government's concession in the district court that Section 211(a)(5)(A) is unconstitutional (in light of earlier decisions so holding) did not resolve the merits of this case because, quoting a footnote in the district court's opinion, even after those other judicial decisions, the Secretary "had continued to apply the challenged section" (see Pet. App. 6a n.2). It is irrelevant, however, that prior to the concession and judgment in this case, the Secretary had not acquiesced in the constitutional holdings of other courts and therefore may have continued to apply the Section administratively. In *this* case, a nationwide class action, the government did formally acquiesce in the conclusion that Section 211(a)(5)(A) is unconstitutional, after the Attorney General notified Congress that he would not defend the statute. See Pet. 3-4. This position obviously was intended to bind the Secretary in the future as against all claimants, and the government accordingly did not appeal the constitutional holding.

As we have explained, 28 U.S.C. 1252 in fact does not require that a direct appeal be taken in this case. But even if the Court in the end should disagree with our construction of Section 1252, at the very least it cannot be said that that Section contains a "clear command" that a direct appeal be taken in a case such as this, especially in view of the contrary indications in its second paragraph and respondents' inability to cite any precedent for the result they seek. Accordingly, if the Court does not reverse the court of appeals' order dismissing the appeal, it is respectfully submitted that the appropriate disposition would be for the Court, consistent with its practice in other cases in which the proper appellate procedure is not clearly established, to vacate the judgment below and remand to the district court with instructions to enter a new judgment from which a direct appeal could be taken to this Court. See, *e.g.*, *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972). See also Pet. 20 n.15.[10]

---

[10]In *Donovan* v. *Richland County Association for Retarded Citizens, supra*, where the Court declined to follow this approach because of the "appellants' simple failure * * * to follow the clear commands of 28 U.S.C. § 1252 and 28 U.S.C. § 1291" (454 U.S. at 390-391; footnote omitted), the result was to leave standing a decision that applied only to one institution. Here, in contrast, the decision of the district court in this class action will bind the Secretary with respect to similarly situated claimants in all community property jurisdictions.

For the foregoing reasons and the additional reasons given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02